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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NATIONAL ASSOC., et al : CV 99-7037

: United States Courthouse

Plaintiffs, : Brooklyn, New York

: February 21, 2003
v. : 9:30 a.m.

ACUSPORT CORPORATION, et al.,

Defendants.

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NATIONAL ASSOC et al., : CV 99-3999

Plaintiffs, :

v. :

AMERICAN ARMS, et al. :

Defendants. :

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TRANSCRIPT OF CONFERENCE
BEFORE THE HONORABLE CHERYL L. POLLAK
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:
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Proceedings recorded by mechanical stenography, transcript

Case called: NAACP v. A.A. Arms, et al.

THE COURT: I guess we have a number of issues on the a again today this morning. Where do we want to start? Who wants to start?

MS. BARNES: Well. You were for plaintiffs I think we have the motion for a additional discovery and does qualification of counsel and I also believe that we have the incident report issue. So, I am going to take the additional discovery and disqualification of counsel issue and if the court if it's all right with the court I will go first.

THE COURT: That's fine. Go ahead.

MS. BARNES: Earlier this month the affidavit of Robert Ricker who were a former trade association executive and former in are a executive surfaced. As the court may recall, I immediately wrote to this court and to the district court indicating a need for action in this case that were based on the facts there were presented by Mr. Ricker in his affidavit. I in fact moved even before Mr. Ricker had agreed to participate in this case on behalf of plaintiffs, in order to notify the court of the issues presented and to begin the process to deal with what I believed then, and believe even more strongly now, would be a dislocation in the representation of defendants in this case.

I am completely mindful of the impending trial date. I'm completely mindful of the years that counsel at issue in

this case have represented the defendants. I'm completely mindful of the enormously tight schedule that this court imposed and that we are all working to deal with.

Mr. Ricker's sworn statements, however, are highly relevant to the issues in this action in which 85 gun makers and distributors are charged with creating a public nuisance that disproportionately affects my client, the NAACP, Afro-Americans, and other NAAC members in the State of New York. The issues in this case, as this court well knows, are that the defendants have created this public nuisance by facilitating the diversion of handguns from the -- I'm sorry, from the legal to the illegal market.

First, Mr. Ricker's issues that he raises in his sworn statement are relevant to defendants' notice, their knowledge of the mechanisms of diversion of firearms, the means by which firearms are diverted, such as straw purchases, multiple sales. They are relevant on the issues of what ATF told members of the industry, what ATF and members of the industry discussed going back and forth with each other, what the industry was told by BATF as to what steps they should take that would assist government in regulating this disparate and enormous and virtually unregulated industry. The issues presented by Mr. Ricker also deal with the use and the knowledge of the trace database by defendants in this action and by counsel.

Second, Robert Ricker's statements are relevant on the issue of concerted action among members of this industry. The joint or enterprise activities of members as presented by Robert Ricker, and repeatedly consistently in sworn testimony denied by members of this industry, in the prior case and in this case, has liability implications for all defendants in this action, particularly, Your Honor, some of the smaller defendants or some of the defendants that I believe will move before this court and before Judge Weinstein on a de minimis argument saying that they were neither large participants, significant participants, or disproportionately crime gun defendants. And whether or not there is a viable joint or enterprise liability scheme in place in this case will affect how the court views the liability of those smaller defendants.

These issues -- all of these issues are to be briefed and heard soon. The papers I believe, Your Honor, for summary judgment are due on the 24th of February.

THE COURT: Monday.

MS. BARNES: Yes, Monday, Your Honor.

There are two parts of plaintiff's application. One is discovery and one is disqualification. I will take discovery first.

In order to adequately prepare for summary judgment and for trial, plaintiff moves now for very limited discovery

against James Dorr, Timothy Bumann, Georgia Nichols, Michael Saporito; and if the court will permit it, against Robert Chiarello, Pat Squire, Robert Delfay, Steven Halbrook, and Richard Gardiner. However, the initial four that plaintiffs require most particularly are James Dorr, Tim Bumann, Georgia Nichols, and Michael Saporito.

Discovery is needed against each of these attorneys who are mentioned in Mr. Ricker's affidavit for the following reasons: In Mr. Dorr's letter, he admits that there were meetings. None of the papers submitted in any of the matters -- in any of the submissions by counsel for the attorneys in this case have disputed Mr. Ricker's claim that there were meetings. Mr. Dorr further says in a letter to Your Honor that these were networking meetings. Mr. Sanetti in his papers to this court indicates that Mr. Dorr was not acting as a representative of Sturm Ruger. Yet Mr. Dorr was present in a meeting with Mr. Bumann, in-house counsel Michael Saporito, Pat Squire, Georgia Nichols, an insurance company representative by the name of Robert Chiarello, who it is my understanding owns or manages the Captive Insurance Company that insures all of these defendants, the National Rifle Association, and the Citizens Committee to Keep and Bear Arms, plaintiff now needs to know in what capacity James Dorr was acting in these meetings. Was he a representative of a trade association SAAMI, ASSC, NSSF? Was he a representative of the

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NRA, or was he in fact a representative of all of them, or was he acting on his own?

We would request as part of Mr. Dorr's examination his time records, his billings to his client, his notes and memos to his clients, in order to validate his somewhat difficult to believe claim that he was acting on his own.

Your Honor, I wasn't invited to do one of these meetings.

THE COURT: Can I just, before you go a little bit further, can you tell me, regardless of what he or in what capacity he was there, why is it relevant to know that?

MS. BARNES: Why is it relevant to my case?

THE COURT: Why do you need that?

MS. BARNES: Your Honor, we need to know whether or not he will -- first of all, we need to know was you acting on behalf of his client for evidentiary reasons. What he says on behalf of his client may be or may not be taken as admissions that may be admissible in this case against him. That's number one.

Number two, whether or not he's acting, in what capacity he's acting, implicates either part A or part B of the disciplinary rule. If his testimony is in support of Mr. Sanetti's statement that there is no joint industry activity, then it is on behalf of his client and he may not testify. If it is in opposition to what his client is going

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to testify, then it falls under part B of the disciplinary rule, and, again, he may not testify. But, Your Honor, I don't even think we have to go there.

THE COURT: Let me just back up for a second.

I thought - and there have been a lot of papers, and I have been trying to keep up with them - but I thought he had said or his client had said that he was not going to be called as a witness.

MS. BARNES: Your Honor, it is irrelevant. Yes, he did say that, and, Your Honor, I would direct the court, and I apologize that I did not initially put these cases before the court, I will give you -- I spoke to Ms. Bo detective. I will present the court with the cases right now. It is irrelevant whether or not he's going to be called or not. The issues in the case from Lanborn v. Dittmer, MacArthur v. Bank of New York; two cases from this court, United States v. Orgad and United States v. Locascio, indicate very clearly that if he should be called, if he is in fact an unsworn witness in this matter, he may not testify. He may not be a participant in the case at all, because of the damage and the prejudice to the proceedings here.

The reason to move now and to deal with this now is that the consequences for going down the road and allowing all of this to come in, and allowing Mr. Dorr to participate, Mr. Bumann to participate, is that you run the very, very

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substantial risk of a mistrial and then reversal.

Under the cases coming out of this court, Locascio and Orgad, those attorneys who were part of the underlying facts and had particular knowledge of the facts at issue, the facts at issue here being these meetings, those attorneys may not stand in the well of the court and cross-examine, or question, or even be part of the trial team that examines the witness that is making those statements. The courts and the Second Circuit have been very clear on this - the cases involving Mr. Cutler - the courts have been very clear on this, that it is prejudicial to the opposing party. It subverts the role of the lawyer in the case. It impacts the credibility of counsel and witness, and it would allow the lawyers who have intimate knowledge by virtue of their participation an unfair advantage both in dealing with witnesses and in having their presence viewed by the jury and by the judge, that either heightens their credibility, because they have information that is not accessible to other advocates who are simply the advocates of the case and are not participants. So the very strong policies are that irrespective of whether he will be called or whether he will not be called, he should be called. And, thus, he may not be a part of this case, and we need to deal with it now a month before trial.

THE COURT: Let me stop you for a second because you

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lost me here.

First of all, I thought that you were making one argument, but then you said something completely different, so I want to make sure I'm following.

I thought what you were saying is that by standing up and cross-examining Mr. Ricker on what happened at meetings that Mr. Dorr was present at, and saying but isn't it true, Mr. Ricker, that what I actually said was, he becomes an unsworn witness?

MS. BARNES: Yes.

THE COURT: And that is your concern?

MS. BARNES: Yes, Your Honor.

THE COURT: There's nothing in the information that I have seen that suggests that he should be called as a witness otherwise.

MS. BARNES: He should be called to rebut -- Mr. Ricker stands up and says, Mr. Dorr and Mr. Bumann counseled against the taking of safety precautions. They counseled against the industry's adherence to the assault weapons ban because all you had to do was change a name and you would fall outside the ban. They counseled various mechanisms for avoiding the responsible regulation of firearms. That's what he's going to say. We were at meetings. They all did it. There was agreement never to disagree. Smith and Wesson stepped out of line. We can go

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many, many places. That's what he will say, it implicates joint activities. There's representatives of at least two major trade associations, probably three. There's intersections of distributors through Mr. Saporito and the ASSC. There's old line manufacturers. There's new manufacturers. They are all held in together. The NRA is present. The Citizens Committee Right to Bear Arms is present. The insurers are present dictating which lawyers are going to be called, what is going to happen, who is going to represent who. Mr. Ricker testifies to this extensive joint activity, which we have never ever been able to obtain discovery on. And now we have it, and now the issues need to be aired, and this is what he will testify to. And then Mr. Dorr and Mr. Bumann cannot get up and argue I didn't say that. They become unsworn witnesses. It would be necessary and the jury would need to know the rebuttal. Mr. Ricker says Jim Dorr, you were there. That's going to go unrebutted.

THE COURT: Well, I'm sure there are, based on my review of the affidavit, other people, other than Mr. Dorr himself, who could get up and say actually I was at the meeting, and Mr. Dorr did not say what Mr. Ricker is testifying to. I heard him say X.

MS. BARNES: But his presence in the case as a named person under the case law creates an unfair advantage to Mr. Dorr, to Mr. Dorr's clients, and it vitiates the entire

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process, and it impugns the integrity of the court. Mr. Dorr has, and Mr. Bumann apparently also, have unique knowledge that is not available to other people, and his unique knowledge is what makes him not capable and not acceptable to be a witness, to be an advocate in the case.

So, I mean, in the first instance, Your Honor, because I know it is an extraordinary remedy, it is extraordinary relief we seek, allow us the discovery to see what it is that he will say. If Your Honor would allow us , Georgia Nichols is within the subpoena power. Mr. Saporito I understand is a former judge in this case. I believe he's still a member of the New York Bar, I believe he can be subpoenaed. Allow us to subpoena those people who are within the subpoena power, and then take the depositions of Mr. Bumann and Mr. Dorr, and we'll see after we have gotten their time records whether or not they were in fact on that particular day acting on behalf of their clients.

THE COURT: Other than Mr. Dorr, Mr. Bumann, and I take it Ms. Nichols, are any of the other individuals who you named, Saporito, Chiarello, Squire, Delfay, Halbrook, Gardiner, are any of them acting as trial counsel in this case?

MS. BARNES: No, Your Honor.

THE COURT: It is just those three?

MS. BARNES: And Mr. Renzulli's papers seem to

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indicate Ms. Nichols is not acting as trial counsel.

THE COURT: Okay. That's what I understood him to be saying as well.

MS. BARNES: So she falls under a whole new category. We would just ask for her deposition. She apparently is quite intimately involved.

THE COURT: So the only disqualification that you are seeking is Mr. Dorr and Mr. Bumann?

MS. BARNES: Yes. And depending on what Mr. Dorr and Mr. Bumann disclose, I mean, and I don't have this in an affidavit form, Ms. Kimball has a relationship, although I'm not able to now indicate what it is, it may be that after Mr. Dorr testifies we'll find Ms. Kimball was also a participant in a number of meetings. However, I don't have that information, so my motion does not go to Ms. Kimball.

THE COURT: Mr. Ricker is not, as far as you know, going to testify that Ms. Kimball was involved in these meetings?

MS. BARNES: It's my understanding that - and just because time has been limited - Ms. Kimball was involved in one meeting. Whether or not it was a meeting, I have not, Your Honor, been able to pursue whether or not it was a meeting such as plaintiffs are relying on here where issues regarding taking safety mechanisms to prevent the diversion of firearms were discussed, motive issues were discussed. Let's

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not take these measures because it will open the floodgates of liability.

I mean, Your Honor, Mr. Ricker's statements go to motive of this industry as to why it was, when the rest of the world is taking enormous safety precautions and the government is telling them why it is that they never ever did it, they closed rank. They imposed a code of silence. They imposed a code of no dissention in the ranks, and were successful in preventing the discovery of what Mr. Ricker has indicated is considerable and is clear concert of action.

THE COURT: How do you respond, Ms. Barnes, to the argument that they have made, which is that these were lawyers' meetings. These were not meetings of the principals of the entities, the people who actually are charged with making the decision. Therefore, even if you are right, even if what was being discussed by these lawyers was concerted action, as you labeled it, it is irrelevant to the question here because it doesn't show that what the companies actually did was concerted action. It's just that the lawyers were talking about it.

MS. BARNES: Well, Your Honor, one interesting part of the arguments against plaintiff's motion is that there are no affidavits from the principals of these companies to that effect. This is just argument. And it does -- whether or not it is called lawyers' meetings or it is called strategy

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meetings, the participants in the meetings and their relationship to the entire industry, I believe, belies the argument that these were simply lawyers' meetings among outside counsel, as I'm sure that the lawyers in this case meet all the time. I mean, they were meeting last week when I was taking Mr. Vince's deposition. They were all meeting. I assume they are organizing their expert witness matters. The meetings that we are talking about here predate the NAACP case. They apparently -- there is no privilege by the presence of outsiders. They vitiated any privilege. They are not all lawyers. The issue here is - just to look a little bit larger -- there are these meetings in which a person who is present at the meeting, who represented at the time a trade association, says that this was gone on and this is discussed. Then what we have is almost unified parallel activity flowing from these meetings. We have it both in the conduct of the litigation. We have it in the direct testimony of every single one, except two, every single one of the 85 except two defendants that I can think of, the testimony is identical on the issues of crime guns, ATF oversight, knowledge of dealers, relationship with dealers, relationship with downstream partners. That's one hand.

On the other hand, we have - and we have this and I put this before the court, I apologize it wasn't sworn - but we have the expert witness report of Dr. Gregory Gundlach.

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Professor Gundlach, as Your Honor knows, is plaintiff's marketing expert who has spent an enormous amount of time in 1500 pages detailing in excruciating detail the practices of each and every one of these defendants, and his findings are that but for superficial differences, this industry has followed identical distribution patterns that vary in the most irrelevant ways.

His statement - and he is, by the way, an antitrust expert primarily in the rest of his work - is that their activity is shockingly parallel. So that's what we have, Your Honor.

I'm cognizant of the fact that this is their argument, and I believe that discovery will demonstrate the parameters of whether or not what this is, networking, trying to get new business, I don't know, talking about other things or whatever, but given the uniform responses of the defendants in this case, I believe that based on Mr. Ricker's statements, it is plaintiff's obligation to both seek this discovery and to notify the court of what we consider the tremendous import of this information. Thank you, Your Honor.

THE COURT: All right. Thank you.

Whose going to speak first?

MR. HERFORT: May it please the court, John Herfort.

THE COURT: Mr. Herfort, you are a new face in this crowd of familiar faces, so I kind of like to know who you

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are.

MR. HERFORT: I don't represent one of the companies, Your Honor. I'm a partner in Gibson, Dunn & Crutcher, and I represent Mr. Dorr and Ms. Kimball.

THE COURT: Okay.

MR. HERFORT: I think that there are two basic parts of Ms. Barnes' motion that we need to look at.

First, the factual part, which is what Mr. Ricker says, and more important what he really doesn't say; and the second part is the law.

I think on the law, which I will get to in a bit, it is quite clear that you have an extraordinarily strong burden not only to reopen discovery after it's been closed for nearly six months, but to take lawyers' testimony, and that's covered in an opinion of Judge Weinstein himself, as well as to disqualify. But turning to Ricker himself, who is the sole basis for us being here today. There are a couple of points to be made.

When you look at his affidavit, okay, the first part of it describes his personal experience. That's not what why we are here. Paragraphs seven through fifteen talk about various individual practices or non-practices of the industry. It is broad brush characterization, nothing to suggest it is firsthand knowledge, and it doesn't pinpoint any particular defendant, group of defendants, or big group of

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defendants. It is just a discussion of industry practices or non-practices that anybody who has followed the gun control debate over the last 20 years has been familiar with whether you are an expert in this case or not. So when you get up to paragraph sixteen, there is nothing new.

There's also nothing new about Mr. Ricker himself. His tribulations with the industry such as they are, his leaving the industry, have been well known for years. Mr. Ricker is not some character who suddenly appeared out of the woodwork in early 2003. Newsweek, as we point out in our brief, has brought out an article with his tribulations with the industry in 1999, when he left the industry. So the notion that Mr. Ricker is a newly blooming character is simply false. It is absolutely false, and we all know that.

The other point about Mr. Ricker is -- several other points. When you look at paragraph 16, which is the pivot, in fact it is the exclusive, basis for the motion today, what does it say? It doesn't talk about any particular practice at all. Ms. Barnes says he's going to talk about ATF, BATF, all sorts of specific things that were alleged, discussed at this shot show meeting. Your Honor, it is not there. Ms. Barnes is testifying that Mr. Ricker. Mr. Ricker never says anything of the sort, and you can read paragraph 16 over and over and over again. Unfortunately I have done that. It simply doesn't say it.

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Now, the issue of joint activity, which is what Ms. Barnes says that Mr. Ricker is somehow going to help her prove, that's not a new concept for this case.

If you just focus on Mr. Dorr's client, and you look at the 30(b)(6) notice that they got, it is in our brief, it is a 30(b)(6) notice that says that Sturm Ruger has to produce someone who is going to testify not only as to individual activity of the company with respect to marketing, distribution, and so on, but also joint activity with other members of the industry and with associations.

Your Honor, Ms. Barnes took Mr. Sanetti's deposition. It is a very long deposition. She doesn't ask a single question about joint activity or associational activity. So this concept that she says now is going to drive this case on liability is something she totally ignored when she took the one Sturm Ruger deposition that she wanted to take. It was in her notice and she ignored the topic, so we think it is a little late.

The issue of shot shows, which is the name of this meeting that Mr. Ricker briefly discusses in this one paragraph of his affidavit, is that a new factual issue for this case? Certainly not.

In the Hamilton case, which Ms. Barnes refers to off and on through her papers, in the Hamilton case she had deposition testimony. She took testimony and she talked about

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the shot shows. So the notion that the shot shows is something new that suddenly fell upon us at the end of January, when Mr. Ricker finally filed his affidavit, that's false.

THE COURT: But let me interrupt you for a second, because I have to say I'm not familiar with what responses to her questions were in those depositions about shot shows.

But was it revealed in those depositions that she took that Mr. Dorr, Mr. Bumann, some of the other names that we heard in Mr. Ricker's affidavit, were present at those shot shows and discussed the various items that Ms. Barnes is claiming Mr. Ricker is going to be discussing?

MR. HERFORT: This is discovery from the prior case which is gone.

THE COURT: Right.

MR. HERFORT: I don't think she pushed to that point.

THE COURT: Well, okay. I don't know if she did push to that point or didn't get responses.

MR. HERFORT: My only point is she ignored the shot shows in this current case, and this current case has been around since 1999, and the shot shows came up in Hamilton.

THE COURT: My question, maybe it is an unfair one to you because you are in fact new to this case, but it was my understanding that perhaps the reason she didn't push on some of these things was because the answers that she was getting

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were that nothing went on along the lines of what we are now hearing from Mr. Ricker. That what we are hearing from Mr. Ricker contradicts the information that she had previously gotten from the various deponents in the Hamilton case, and, I suppose, believing that she would get the same answers here, she didn't press them in this case, but maybe I'm wrong.

MR. HERFORT: That's not what she said in her papers.

THE COURT: I will let Ms. Barnes respond.

MS. BARNES: That's exactly right, Your Honor, that was clearly laid out in the first case, and we had such a lot to do and so little time, there was no reason to believe it. Precisely right, Your Honor.

MR. HERFORT: Your Honor, there is. I was just given a transcript before Your Honor in 1995, and in the Hamilton case of all things.

THE COURT: Was I even a judge then?

MR. HERFORT: You were apparently there, and you were identified.

THE COURT: It must be me.

MR. HERFORT: I don't know what else to say.

THE COURT: Unfortunately I'm sure I don't remember what I said then.

MR. HERFORT: In subpoenaing counsel that issue came up, and Ms. Barnes had some comments here, and it's at pages 72 to 73 of the transcript.

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THE COURT: I'm sorry, what is the date?

MR. HERFORT: December 4, 1995.

MS. BARNES: I think it's Exhibit C.

MR. HERFORT: May I approach the bench, Your Honor?

THE COURT: Sure.

MR. HERFORT: It starts here on 71. It says THE COURT. And then we have Ms. Barnes saying - this is back in the old case: Your Honor, if I may? I held off because it is very -- I'm aware of the weightiness of -- in issuing subpoenas involving counsel in the case. As you've noted, I have not subpoenaed the other ones because Mr. Dorr and Ms. Kimball have appeared for years at the Sporting Arms and Ammunition Manufacturer's Institute and they have been represented there as being there as counsel. They are not there in their individual capacities. There was, obviously, no basis to deal with them in the same way.

Then she goes on to say that - at the top - she sort of characterizes the industry and so on.

I can give this to you, but, I mean, that was not pursued. She raised the very issue she's talking about today. She raised it seven and a half years ago. My understanding, Your Honor, is that she dropped it seven and a half years ago, and now we are almost exactly a month from trial and we hear of the well-known, not little known or recently discovered, but the well-known Mr. Ricker. And what

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does he say? He doesn't talk about individual practices. He doesn't talk about individual company behavior in connection with the practices. He talking about, in paragraphs seven to fifteen, he merely says that some lawyers, many of whom are not counsel of record in this case, had some meetings in which they talked about action, not any specific action. And the notion that this case is going to pivot on a broad brush concept of action, as opposed to specific action, I think is beyond the pale. We know it's going to focus on specific actions. Ricker doesn't, and I think for almost that reason alone there's a serious question as to his relevance at all.

The concept of the lawyers hear having intimate knowledge, and the reference to of all people Bruce Cutler in a case like this, I think frankly is almost beyond the pale. We all read these opinions involving Mr. Cutler, and Mr. Cutler was disqualified for a very simple reason, Judge Glasser found that Mr. Cutler, another one of the defense lawyers, served as the cement which held a RICO criminal enterprise together. So the issue is not simply their activities as lawyers.

The only thing that suggested in our case that involves activities as lawyers, it was activities as people who held together the Gambino family's criminal enterprise by receiving benefactor fees, by defending other people, by keeping people quiet and pleased. So the notion that this

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case can be compared to the Bruce Cutler situation by analogy is frankly an insult. It's an insult to the client and I think it is an insult to the record.

THE COURT: How do you respond to Ms. Barnes' argument that if Mr. Dorr is acting as trial counsel, and is called upon to cross-examine Mr. Ricker, he becomes necessarily an unsworn witness?

MR. HERFORT: Well, I think, first of all, we have to see what Mr. Ricker is going to say. If Mr. Ricker says what he says in paragraph 16, it is not all clear to me that anybody who will cross-examine him because his testimony will be utterly meaningless.

THE COURT: I understand that.

MR. HERFORT: Let's assume it becomes meaningful, which is speculation. Mr. Dorr probably won't cross-examine him. Other people will be at the bench, and there are other witnesses. The key point is under the disciplinary rules there are other witnesses. There are other witnesses that can be called to support Mr. Ricker. She's mentioned some who were not involved as counsel of record in the case, and there are other witnesses that can be called as defense witnesses to rebut Mr. Ricker, if necessary.

THE COURT: I understand that point.

MR. HERFORT: The question is, is Mr. Dorr going to be vouching for them?

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THE COURT: That's the question, either in cross-examination or on what Mr. Dorr's position is going to be at the trial. If he's going to be the lead counsel for his client, he's going to be the one that stands up and does the summations, where, again, it's not just cross-examining Mr. Ricker, but in summation he could be seen defending on what is said as an unsworn witness.

MR. HERFORT: Your Honor, I think to say that it gets us into an area of speculation which is far beyond the kind of showing you need to think about changing counsel at this date.

THE COURT: But let me ask you this --

MR. HERFORT: The reason is we don't know what Ricker is going do say.

THE COURT: But here's my problem, Mr. Herfort. I understand what you are saying, and you are right, it is speculation, but we won't know what Mr. Ricker is going to say until he actually takes the stand, if he takes the stands, and says what he's going to say. Even if you take his deposition, we may not know exactly what he's going to say. When he gets up on the witness stand, you all know things come up during cross-examination that have never been said before. So, you are right. But the job that I have to do here necessarily involves some degree of speculation, otherwise we are going to get to the point where Mr. Dorr is up there, and just using Mr. Dorr because he's your client, it could be Mr. Bumann or

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any of the other named attorneys here, and something comes up during cross-examination and we have a mistrial. I'm sure Judge Weinstein doesn't want to have that happen.

So I guess my question is, how can I protect against that, at this point along the way?

MR. HERFORT: I think the way you protect against it is by requiring a very strong factual showing, which is what all of the disqualification cases in her brief and our brief say you have to have. If you can disqualify a lawyer on the eve of trial with a late blooming witness who says there's an event as to which one of the lawyers has some knowledge, Your Honor, what you have done is you took the standards for disqualification under DR 5-102(C) and (D) and I think you pushed them far beyond where they properly go. You have to have it. The standard in the statute is obviousness, and the drafters of the disciplinary rules don't use the word "obvious" lightly. It has to be absolutely clear that you are going to have the problem of the lawyer acting as witness and vouching that you believe that requires disqualification. Also the necessity standard, which we talked about in our brief, which I think is the other point, because there are other witnesses.

But I think what Your Honor is getting at is, are you going to have an inescapable tendency where the lawyer in effect is going to be an unsworn witness vouching for the

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opposite of some story or the story he wants to propound to the trier of facts? The answer is, it's not obvious at all here, and it's far too early to suggest that it is.

As I said, let's go back to the whole basis for this motion.

The whole basis for this motion is one paragraph out of 21 in Mr. Ricker's affidavit. Mr. Ricker simply talks about some lawyers at, or many of them at one particular trade association meeting in the '90s. He doesn't talk about those lawyers' connections to any individual trade practice. He doesn't talk about any individual trade practice being discussed by those lawyers. He doesn't remotely suggest - and believe me, if he believed it, he surely would give given his hostility to the industry - he doesn't remotely suggest that the commercial decision-making to have or not to have a particular knowledge of marketing distribution was the function of what those lawyers did or didn't do at this particular trade meeting. So we have to keep a sense of formality here.

You have to look at that paragraph and what Ms. Barnes talks about Mr. Ricker, and put it in a context of the case. If it is a big circle in the center of the case, that's one thing. The cases she cites in the Fifth Circuit and one in the New York courts, one of the lawyers was responsible for the whole case itself, one negotiated contract. They were

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fighting about the core principal we are talking about, no pun intended. It has to be at the heart of the case. And it's beyond me, based on what we know about this case today, what I have been able to learn last week, that the shot show meetings among nine lawyers and no businessmen are the core of this case involving the various practices or non-practices. You have to be at the core of the case, under Ms. Barnes' own law, to invoke the lawyer vouching problem as a basis for his disqualification. To compare it to Cutler's case, Cutler and Shargel were at the core, at the core, of the Gotti RICO conspiracy trial. Their behavior was at the core in numerous ways, and you can read Judge Glasser's opinion.

THE COURT: I read it.

MR. HERFORT: It's an endless catalogue citing about 30 different quotes from wiretap evidence of specific actions or known actions or representation of other people receiving money to represent other people, that Mr. Cutler and Mr. Shargel allegedly were involved in. That's a far cry from what we are talking about today. So I think you have to look at what this case is, the importance of the single paragraph, and the fact that there are other witnesses which goes to the necessity standard, and I think you have to look at the language of the disciplinary rules to be candid. The word "obvious" is a pretty strong word, and I don't think it is remotely close to being satisfied here.

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THE COURT: All right.

Let me hear from Ms. Barnes.

MR. HERFORT: Can I address one thing about the depositions?

The depositions, Your Honor, I think maybe I just wanted to briefly anticipate the argument that, well, let's not talk about disqualification now, because we'll deal with that after we have depositions. Depositions, as I think we all agree after six months after discovery has ended, are a strong remedy anyway, and I don't believe she's shown they are necessary. But deposition of lawyers, of all people, very to satisfy three standards that Judge Weinstein articulates in the All Funds on Deposit case, which is cited I think in just about everybody's brief except for Ms. Barnes. The first standard is, is there is no other way to obtain the information, is there no other way to obtain the information about the shot show meetings besides going to Jim Dorr and to Mr. Bumann? I think not.

THE COURT: Forget Mr. Dorr and Mr. Bumann for a minute, okay. Let's put them aside.

I would like you to address the question of whether or not she should be permitted to take the depositions of some of the other participants in this meeting, who are not active trial counsel in the case.

MR. HERFORT: My view is no, and the reason my view

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is no is because it is too late. This material has been available for a long time. There's nothing new. Mr. Ricker's problems an animus towards this industry have been well-known at least since 1999.

THE COURT: Okay. Let me stop you here again and ask you this question: The information that Mr. Ricker reveals in the affidavit regarding these, paragraph 16 if you will, that is well-known and has been revealed in the industry for a long time?

MR. HERFORT: No, as such it has not.

THE COURT: Okay.

MR. HERFORT: But let me say -- let me answer your question. The allegations in paragraph 16 about what one particular person said or opposed, I have not, but what is known is the following, that these lawyers' meetings at the shot show conventions did occur. That they were attended by some or all of the characters that Mr. Ricker now says attended them. Mr. Ricker's concern over the industry's so-called practice of not reforming itself has also been well-known. It's been well-known since 1999. That's one of the reasons he was ultimately terminated from the industry. He's thoroughly forthright about that.

So the idea that these three old topics, Mr. Dorr going to these meetings themselves and Mr. Ricker's problem with the industry, should be the basis for out-of-time

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depositions, and it doesn't matter of whom, I think stretches it a bit far. She knew -- Ms. Barnes knew about these meetings. She knew the information I just gave you about that. She didn't pursue that in Hamilton, Mr. Dorr going to these meetings back in 1995. She is not going to tell you about Mr. Ricker, or Mr. Ricker's position vis-a-vis the industry. Everybody knew about that since 1999 when he left. So what is the basis for forcing us, forcing anybody, the court, the lawyers, the prospective possible deponents, besides Mr. Bumann and Mr. Dorr, what is the basis for forcing them to engage the subject of discovery, when we do have a standard that I think governs it here?

THE COURT: Well, I have to say this, Mr. Herfort, despite my involvement in this case and the prior case, I was not aware of Mr. Ricker's position vis-a-vis what was said by these attorneys at these meetings. So when I read the affidavit, it came as nothing of a surprise to me.

Now, maybe you are right, maybe Ms. Barnes has known about it for years, as you suggest. But, again, I would have to say I'm surprised she didn't bring it up sooner, that she brought it up immediately after the affidavit appeared in the California action. So I guess I am going to have to ask her that. But I will say that despite what you are saying, I'm not sure everyone was aware of what Mr. Ricker had to say in paragraph 16.

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MR. HERFORT: Your Honor, I don't think that the issue is really what was aware. The issue is what a reasonably diligent lawyer would have done in the time allotted to generate evidence to help.

THE COURT: But if everyone is telling her the opposite, then I don't know how she's going to develop --

MR. HERFORT: Your Honor, Mr. Ricker -- if there's evidence that Mr. Ricker has been hiding it alludes me. We have known since 1999, and Ms. Barnes has known since 1999, that Ricker was out there, that he's a critic of the industry, he doesn't like the industry. He's concerned that the industry allegedly didn't do some things in terms of self-reform, or self-regulation, or however they want to characterize it, that they should have done.

Why didn't Ms. Barnes in the time that she had talk to Mr. Ricker, or why didn't she probe the issues that she raised, but didn't follow in Hamilton in 1995, when she took Sturm, Ruger's deposition? She took the deposition with Mr. Sanetti. I hate to burden you with it. It is a long deposition. It's an exhibit in our book. It is a deposition. She had plenty of time. We would have given her more time. But the bottom line is, look at her deposition notice, the deposition notice to Mr. Sanetti, involved with his lawyers. Her very deposition notice talked about joint activity, as well as individual activity.

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In terms of marketing, distribution, and the things involved in this case, I think that she flunks. She frankly flunks the due diligence standard of discovery in this case. She never got to Ricker, and she never asks Sanetti any of the questions that were suggested in her own deposition notice about joint activity. That's the best way I can answer your question.

THE COURT: All right. Let me ask her about those things.

MR. JOSEPH: May I be heard on behalf of Mr. Bumann for a few moments?

THE COURT: If you have something to add, that's fine.

Who are you?

MR. JOSEPH: Gregory Joseph for Mr. Bumann.

THE COURT: Are you with a firm?

MR. JOSEPH: My own firm, Your Honor.

THE COURT: Okay.

MR. JOSEPH: Your Honor, I would just like to focus on a couple of questions that Your Honor has asked, specifically about disqualification, really, because of attendance at a meeting, which is a very fair question, because there are several cases that specifically address it and say no disqualification. If I could direct Your Honor specifically to the brief we filed. I'm looking at page 8,

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the Perretti case from the Southern District: "To the extent that a party made an admission at the July and October meetings, there are five different persons who can testify about what the parties said or did; therefore, the attorneys' testimony would be merely cumulative. The test under the rule is, is it necessary or merely cumulative. The fact that she requested additional testimony, which she can take at trial or at deposition, demonstrates it is not necessary.

The Herr case, also from the Southern District: Given the large number of witnesses to the events at the three union meetings, any testimony attorney Brodsky could offer would be merely cumulative. No disqualification. He may act as counsel on all issues of fact.

S & S Hotel, a New York Court of Appeals, and it is New York Court of Appeals ruling under Rule 5-102: Plaintiff did not dispute its attorney Sassower participated in negotiations or communications with defendant. However, it was error to give no recognition to plaintiff's contention that Sassower's testimony was not material or even necessary, because her testimony would at most be cumulative or relate to matters of formality.

And the Plotkin case from the Appellate Division: Respondents have failed to rebut the plaintiffs' contention that the plaintiffs themselves were present during various conferences and available to testify to the key events

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surrounding the parties' dispute concerning the house construction plans.

When others are present, you don't satisfy the rule. I just would like to spend a second on the text of the ruling. That's something nobody mentioned. 5-102(A) is governing. It says: A lawyer shall not act as an advocate on issue of fact before any tribunal, if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client. All right. "Ought" is not merely "should." "Ought" is necessary. If it isn't necessary, EC5-10, ethical consideration, says: Merely cumulative that's not disqualifying.

For three of Mr. Bumann's five clients he did not even represent them at all during the time of these meetings, Rossi, Heritage and Braztech. Braztech wasn't even in existence until December of '97. We have sworn testimony which is unrebutted from the other two that he did not act on their behalf at any meetings. This is the Declaration of Mr. Morrison on behalf of TIMI, paragraph two. This is contrary to what counsel said.

So I think it is important Mr. Bumann has never represented TIMI at any meeting with authority to set policy for TIMI, nor has he ever represented TIMI at any trade association at which TIMI is a member. TIMI has never given to Mr. Bumann -- given Mr. Bumann such authority.

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We have exactly the same testimony, slightly different words, from Mr. Murgel. I mean, this is actually an unprecedented and dangerous motion. Lawyers who specialize in various areas of law often go to trade shows, not paid by client to go to trade shows. They will meet with other lawyers who represent similar clients and discuss issues. They are not paid by clients to do this and are not representing clients when they do this. They are, therefore, having nothing to do with any concerted activity that the plaintiff may want to show. But to start disqualifying lawyers because of meetings they attended, not on behalf of clients, but if anything to generate clients, is unprecedented. It is not necessary. The participation of these gentlemen, and Mr. Bumann in particular, would not only taint the trial, it's essential for his client and it is in 5-102 an exception.

Even if there were necessity, which there is not, and under the S & S Hotel case from the Court of Appeals, it couldn't be clearer. It says: Testimony may be relevant and even highly useful but not strictly necessary, if it's cumulative. There's an exception as to any matters, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case. Professor Simon, who is the leader and authority on New York ethics says: The

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distinctive value of a lawyer comes from participation up to the eve of trial, that is distinctive value, that is intimate familiarity. Summary judgment motions due on Monday, trial one month from Monday, the Second Circuit in Nyquist emphasizes this is a drastic remedy that this plaintiff is seeking; and the Locascio case says the same.

I noticed the opinions that counsel does cite are criminal cases, but if you look at the analytical framework, this is a drastic measure. And the court here in the Southern and Eastern District Asbestos cases says that the plaintiff has a very heavy burden of proving facts necessary for disqualification. Plaintiff says, why do we have to speculate at this point? That's not enough for disqualification. That itself like noticing other people's depositions demonstrates there's no necessity.

Three standards at the time for Judge Weinstein: No other way to get the information except from deposition of Mr. Bumann. They demonstrated that's incorrect. There are other -- seven other witnesses, apart from Mr. Ricker himself.

The second part has to be relevant and unprivileged. For three of his five clients he didn't represent them at all at the time, and the other two affirmatively say we didn't pay him; he was there on his own.

Lastly, it has to be crucial to the preparation of

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the case. That's something that if it was crucial, why didn't she depose him before? She appreciates she didn't know about it.

There's no claim that anything Mr. Bumann did was evasive about these meetings. The fact she's now uncovered them may be a reason to call Mr. Ricker at trial. She may want to call Ms. Nichols for a trial one month away. Why is it necessary to reopen discovery? The three-part test from the All Funds case is not satisfied, and for the same reason it is not necessary that they testify at trial. They said we are not calling these guys. They didn't act for us at the time. Two others didn't know him at the time. And the other two said he's unlawyered, he wasn't there acting for us, trying the case for us. The fact that lawyers go to trade shows and talk about business among themselves is not grounds for disqualification and not concerted action if they are not being paid. I'm not impugning anyone's motives, Your Honor, here. They have a heavy burden to bear and they haven't borne it. Thank you, Your Honor.

THE COURT: Thank you, Mr. Joseph.

MR. RENZULLI: I represent Ms. Nichols, and I think you had a question about that. I'm not sure you got an answer, so I'm about to do that, if you give me a couple of minutes.

THE COURT: Tell the court reporter your name.

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MR. RENZULLI: John Renzulli on behalf of Ms. Georgia Nichols, and general counsel of K.B.I. Inc.

The real issue, and I apologize I have been running through deposition transcripts of 13 clients to try to get ready for this trial and didn't have a real opportunity to read all of the papers, and certainly I don't read cases because they confuse me, but the bottom line issue is this, the real issue here is whether this affidavit that had been submitted is out of time. Nobody has raised that.

THE COURT: Mr. Ricker's affidavit?

MR. RENZULLI: Mr. Ricker's affidavit. What about Mr. Ricker and what he says? I just turned around for a second and I saw a reporter in the courtroom. That reporter has reported in the newspaper, I believe it is the Wall Street Journal, I'm not sure, I'm almost sure, all of the events which are now situated in this affidavit that was submitted by Mr. Ricker, all of the events.

The fact that there were shot shows, the fact of the tampering in 1997 incident, I'm not sure what that was all about, was all a matter of public record. That's number one.

Number two, the reason why we have a relatedness doctrine in the district court is so that there's a continuity and purpose in cases, and that they go to the same judge who has reviewed the issues, or the magistrate that reviewed the discovery issues. While I vehemently oppose that the

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relatedness of this doctrine applies in these cases, the bottom line here that we forget, there's a key ingredient in this case and in the Hamilton case that we are all turning a blind eye to, a full day of Richard Feldman, the executive director of the ASSC, boss and capo of Robert Ricker. The bottom line is, all of this was laboriously gone into in eight to ten hours of deposition of Mr. Feldman, pleadings -- as a matter of fact somebody gave a snippet, one of these lawyers, about the fact that he was on the ASSC, and you might remember that Ms. Barnes laid a subpoena on me. These were all issues that were taken up in 1996 for about eight hours.

Concerted actions, what did the lawyers say? What did the clients say? What about this voluntary program? That was all done. This is water under the bridge. What this is is a vice. What this is a diversion to get this case to trial. And, as I understand it, Judge Weinstein wants this thing to go, and wants it to go on a certain date, and we are ready to go.

Now, let's look at - again I have not studied this to a great extent and I don't represent Squire or Delfay, who is not even listed in paragraph 16, I don't even see a reference to Robert Delfay, I don't know how he snuck in in this case, somebody who should be deposed.

THE COURT: Mr. Renzulli, enlighten me, who are Mr. Squire and Mr. Delfay?

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MR. RENZULLI: Mr. Squire I think had a company called Powder Horn.

MS. BARNES: Your Honor, Mr. Squire was head of Colt, and he was also head of Interarms, two major defendants in both the Hamilton action and in this action, Your Honor.

MR. RENZULLI: Your Honor, Pat Squire in my error and I'm not pretending that I'm young because I'm not was an expert witness in a company he did that for was called powder horn I believe, okay. Mr. Halbrook, I believe, and Mr. Gardiner are lawyers who take a pro-gun position. That's about as much as I can do on that.

I know that Don Kates has written books about crime, and gun control, and things of that nature, and I have read some of the things that Don Kates has written. I don't know how they fit into this.

Robert Chiarello, who is listed in paragraph 16 as a general counsel or industry in-house counsel, if you look there, I think it is about eight lines down, is an insurance broker who writes insurance for product liability companies, including guns and machines. He also writes policies, auto policies and property policies. Why that poor man is dragged into this I have no idea, other than the fact if you write a policy for a gun company, you are somehow complicit in gun activity.

I know who Robert Chiarello is. I have had dinner

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with him many times. I know his wife and children. If you look at the affidavit very closely, the issue of Feldman and I advocating proactive approaches, Feldman was deposed in 1996, again for ten hours on that very issue. That's number one.

Number two, there seems to be, if we look, you know, beneath this affidavit an argument that the industry does not take any voluntary action on safety issues. Ms. Connell reported, and reported correctly, that the industry met with the president in 1997 and 1998 on a voluntary lock program. What am I getting at? He said, she said. Mr. Ricker's affidavit, if he is so permitted to testify in this trial, I think it is off time, but let him get on the stand, Your Honor and, let him testify to what he thinks he needs to testify to further the plaintiff's case. There was a very -- you asked a very practical question. I don't think you will see, and I can represent to these guys they are not going to get up there, assuming Mr. Bumann and Mr. Dorr does the summation in this case, and say -- and Judge Weinstein won't allow it, you know, that Ricker, he's a dirty rotten liar because I was at a meeting where I never said that.

First of all, Judge Weinstein won't allow that.

Number two, I can assure you that's not going to happen. Mr. Ricker will be cross-examined on the basis of his affidavit. This is not at witch hunt. We are not going to take insurance agents' depositions, or Don Kates because he

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wrote a book about, you know, pro-gun control, or Ms. Nichols who at the time, as listed in paragraph 16 - and I will take Ricker's word as true - was general counsel for O.F. Mossberg & Sons, a nonparty to this case.

Why that testimony would be relevant, and what O.F. Mossberg believed about voluntary controls, et cetera, I can tell you because I represent them, they were the first company in 1987 to have locks sent with all of their guns, all of their shotguns. So what this is is, if the court believes that Ricker is not out of time, then let him get on the stand and let him be cross-examined. That's what a trial is all about. If there is some inaccuracies here, they will be exposed. There's no need. And I think what Ms. Barnes is trying to do is bolster what Mr. Ricker is saying by getting Don Kates, some guy who wrote a pro-gun control book, or Mr. Bumann, because he was marketing at a shot show, which is irrelevant, absolutely irrelevant.

This is not a bolstering exercise, Your Honor. The HCI, the BBC, the anti-gun forces, are all out there. Everybody knew Ricker was out there. He was Feldman's right-hand man. Feldman was deposed in 1996. This is much to do about nothing. There is nothing new here. Let's go to trial. Let's get back to what we are supposed to do, and what Judge Weinstein wants us to do.

By the way, I'm not representing Chiarello, Squire,

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Delfay. I'm pro bono on this Nichols deal. So, you know, if the court is inclined to take their depositions, would you allow them to put in papers, I guess, to defend themselves in some way. Again, maybe I don't even have standing to ask this. I think out of common courtesy we are dragging people out that have a certain maybe pro-gun viewpoint based upon their studies and dragging them into this courtroom to answer Ricker's allegations is a little unfair.

THE COURT: Well, I will take your request under advisement.

MR. RENZULLI: Thank you, Judge, and thank you for listening.

THE COURT: Sure.

Okay, Ms. Barnes, do you have anything you want to say in response?

MS. BARNES: Yes, Judge, just a couple quick comments.

Mr. Delfay is head of this SAA, Supporting Arms and Ammunition Manufacturers Institute, and head of the NSSF, which is another trade association linked with Sammy.

Your Honor, I can only say that I did not know of Bob Ricker, and if the court will recall, I am the person who brought forward the prior industry insider, Mr. Robert Haas. So I feel I have a little bit of credit with trying at least to do some work in the case. But. Anyway.

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THE COURT: Let me just ask you, you didn't know about Mr. Ricker at all, or you didn't know what he was going to be saying?

MS. BARNES: I vaguely recall his name being on ASSC documents, and counsel has provided a Newsweek article that is still completely unenlightening because in paragraph one it says strange credentials for a guy who just became the new public face for the nation, is a leading handgun manufacturer. That seems to indicate to me that he is still bound hip to jowl to the industry, had no knowledge of anything about Mr. Ricker saying anything about what his meeting would be.

THE COURT: And you didn't see the Wall Street Journal article that Mr. Renzulli spoke of?

MS. BARNES: The article that Mr. Renzulli is discussing is not about this. It is my understanding it's about something very different, had nothing to do with this. I believe even Mr. -- I believe Mr. Gross was at that meeting. I mean, the meeting --

MR. GROSS: What meeting, now? I'm at the meeting, too?

MS. BARNES: No, I believe that the meeting that was reported in the Wall Street Journal was an informational meeting for lawyers, and I believe a number of counsel present in this case were reported as being at that meeting, had

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nothing to do with an industry meeting involving an insurance broker, the NRA, all of the major trade associations, had no idea of Ricker, had no knowledge of what he would say, and nothing in anything they brought forward that would lead me to believe that.

I just have a few other points of clarification.

I was having trouble remembering why it was that Mr. Bumann and Mr. Renzulli were subpoenaed the last time, and it was because they were listed in ASSC documents as members, and the context of remarking about Mr. Dorr and Ms. Kimball is that there were documents that were provided by subpoena from the NSSF and SAAMI, that listed counsel being present in, you know, either in a general assembly meeting or something else, and it was to that that I was referring, that they were present at established meeting s that had minutes taken, where notes were recorded and discovery was produced to me. I contrasted in that matter the instance wherein no sense had I ever seen a document that listed Ms. Kimball or Mr. Dorr as actual members of SAAMI in the context of that motion. Mr. Bumann and Mr. Renzulli were listed as members of a trade association. And so that was just one point.

THE COURT: But you were not aware of the specific trade association meetings that Mr. Ricker discusses in paragraph 16 attended by Mr. Bumann and Mr. Dorr?

MS. BARNES: I was unaware, and if you read Mr. -- I

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believe it is in his affidavit, first of all, it is a series of meetings that take place over approximately six years. They are not meetings that notes were kept of. There are no notes of those meetings, and there is no indication until Mr. Ricker came forward from the depositions of any of the parties in this case, or Mr. Feldman, that there was any activity. I would specifically ask Your Honor to examine just the end of Mr. Sanetti for Sturm Ruger's deposition, that was taken in November of 1995.

THE COURT: This is in the old case?

MS. BARNES: In the old case, and this is questioning not by me, Your Honor, but this is questioning at the end of my deposition by Mr. Dorr of his own client, and I think on that level it is extremely instructive. Mr. Dorr asks a series of questions of Mr. Sanetti about joint activity.

"Question: What other involvement do manufacturers of firearms have in the distribution of Sturm Ruger products? They are competitors. They hope we don't distribute any. They have no affects over what involvement to trade associations that exist have in the distribution of Sturm Ruger products. They can't and don't have any influence over the distribution.

What involvement does the NRA or other consumer organizations have in the distribution of Sturm Ruger products?

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As a consumer organization, they have no input into our distribution. They are unilaterally set up by Sturm Ruger. We hopefully get our products to legitimate research purchases, but the NRA as a consumer group, they can't tell us and don't tell us or try to tell us how to sell our products.

Is it correct to claim that manufacturers of handguns and distributors of handguns and trade associations such as SAAMI, NSSF or ASSC have specifically agreed and jointly acted with respect to firearms distribution?

The answer is same answer, once again we do not and cannot do that. That would be illegal.

Your Honor, we are presented here with Mr. Sanetti saying one thing and Mr. Ricker putting in sharp contrast these facts. Plaintiffs were stymied from beginning to end. We would not have even known anything about these meetings, because of the unilateral stonewalling and cover-up by this industry, by all participants, and by apparently some of the lawyers in this case, unless Mr. Ricker had stepped forward.

And by Mr. Dorr's own questioning, he raises the issue that I would respectfully agree with Mr. Renzulli on, a trial is to disclose all of this after all of these years, and let us have a trial, but let us have a fair one, and let us have one where it is not subject to mistrial or reversal, Your Honor.

THE COURT: Anything else?

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MR. GREENWALD: Your Honor, may I speak?

My name is Larry Greenwald, and I represent one of the defendant manufacturers.

Because your decision had implications for people beyond the people involved in this particular motion, the arguments you heard have been on behalf of the individuals involved. I wonder if I could say a brief word or two on behalf of at least my client, and this is really in addition to what has been said.

THE COURT: Sure. Go ahead.

MR. GREENWALD: I would like to identify the legal frame work which Ms. Barnes has offered as the justification for reopening discovery, I'm not going to get into any of the elements relating to disqualification.

She offers in her papers two legal bases. The first is the so-called enterprise liability. She says that's a basis to elicit testimony from others about these meetings, because they might have something relevant to say about enterprise liability.

Well, what is being lost is that enterprise liability simply does not apply here, and I invite the court's attention not only to the cases, some of which are cited in the brief filed on behalf of Mr. Dorr and Ms. Kimball, but specifically to a case decided by Judge Weinstein in 1996, Hamilton v. Accu-Tak, and I invite the court's attention to 935 Fed. Supp.

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at 1327. And the basic elements or the critical elements of the enterprise liability are, first, that all members, or virtually all members, of the industry are called upon to account for some wrongdoing. In the key case, which Judge Weinstein in 1996 relied on, Hall v. Dupont, a case which again Judge Weinstein decided in 1972, and that's at 345 Fed. Supp. 353, the setting was that there were six manufacturers of blasting caps, and a child was injured by a blasting cap and was unable to -- there was a suit filed, and one --

THE COURT: Well, recall the case.

MR. GREENWALD: All right. But what evolved out of that case was the standard for enterprise liability. In a setting where there were six manufacturers, and where they represented the entire blasting cap injury, and where the manufacturer who produced the cap responsible for the harm could not be identified, it was held that enterprise liability would apply.

In writing his decision, Judge Weinstein specifically pointed out it is one thing when you have a small group of defendants or small group of manufacturers, but it's quite another when you have a larger group, and enterprise liability will not apply in those circumstances, and that concept has been affirmed in any number of the cases.

So, here, the point to be made, Your Honor, is that enterprise liability does not apply, and, therefore, that

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justification for reopening discovery, which is something which has a serious impact on all manufacturers, certainly on my client, that simply does not stand. The only other legal justification which Ms. Barnes has offered for reopening discovery is what she called joint enterprise or in her papers she called it concerted action.

Now, in order to establish concerted action, you need to show an express or tacit agreement to engage in a tortious act. That test is set forth among other places in not surprisingly a case written by Judge Weinstein, Hamilton v. Accu-Tek, but this one at 62 Fed. Supp. 2d 802, at page 840. That was decided in 1999. There has to be evidence of an express or tacit agreement to engage in a tortious act.

Now, the question becomes, did anything Mr. Ricker said in his affidavit even approach that? And, you know, we haven't here today parsed out what Mr. Ricker has said, but in paragraph 16 of the Ricker declaration, as I read it, stripping away a view things which I don't think really go to the heart of it, but the entire paragraph is cited on page 4 of the brief, filed on behalf of Mr. Dorr and Ms. Kimball, he says three things, and let's examine each one of those, and after listening to what he says, just ask yourself, so what? What does it have to do with anything?

First thing he says, some of the most important discussions of industry policy issues occurred at the shot

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show. Typically - I will skip some language - lawyers for the firearm is industry would informally meet to discuss various legal legislative and policy issues facing the industry. That's one thing he says, and I say, well, so what? So in his words, some lawyers got together to do what? To talk about what? About legislative, legal, and policy issues facing the industry.

Well, does that even knock on the door of the standards reflected in Judge Weinstein's opinion that there be an express or tacit agreement to engage in a tortious act? What prey tell us a tortious act when industry lawyers get together to talk about legislative, legal, and policy issues facing the industry? There's just nothing there.

Let me turn to the second major thing that he says as I read his declaration.

He says: These meetings often address questions such as whether the industry should take voluntary action to better control the distribution of guns. Richard Feldman and I advocated a more proactive approach as a means of heading off legislative action and reducing the risk of future liability.

Mr. Squire, Ms. Nichols, Mr. Dorr, Mr. Bumann and others consistently opposed that idea.

Well, so what? So they had a discussion about an issue that was important to the firearms industry, and accepting what Mr. Ricker says as true, he says let's do it,

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others say we disagree, and what prey tell does that have to do with the standard for concerted action liability, which is an express or tacit agreement to engage in a tortious act? Is it a tort for members of an industry discussing an issue to have a disagreement, even a heated disagreement? Since when does that rise to the level of something being actionable, and how in the world does that justify reopening discovery at this late date?

Let me get to the next thing, and I recognize the plaintiff paints these things as being something nefarious, some plot, some smoking gun, but if you look at the words that Mr. Ricker spoke in his declaration, it is just not so.

The third thing, beginning in 1994, Mr. Dorr and Ms. Nichols became concerned that industry counsel were openly talking about such things. Jim Dorr told me he thought the meetings were dangerous. Georgia Nichols told me that Jim Dorr put out the word industry lawyers should not attend future meetings. So what? Assuming it is true, so what? Someone expressed an opinion these meetings are not a good idea, meetings stopped. Well, where in the world does that rise to the level of an express or tacit agreement to engage in a tortious act?

What is the tort?

Assuming the opinion was expressed, assuming the meeting stopped, what does that have to do with anything, and

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how does that come close to the plaintiffs meeting their very, very high burden of fulfilling the requirements for this court to grant truly extraordinary relief by reopening discovery?

Now, Ms. Barnes made a point earlier, which I need to address. She says that there was conscious parallel activity in connection with these meetings or as a result of these meetings on the part of the industry. Well, you know, the New York Court of Appeals has addressed that very question in Hymowitz v. Eli Lily Company. The New York Court of Appeals took on an earlier case in which parallel action played a large role and was a foundation for the theory of concert of action. But listen to what the New York Court of Appeals said about that earlier case in Hymowitz. It is said: Now, given the opportunity to assess the merits of this theory, this theory being the parallel action, we decline to adopt it as the law of this state.

Parallel behavior, the major justification for visiting liability caused by the product of one manufacturer upon the head of another, under this analysis, is a common occurrence in industry, generally. We believe, therefore, that inferring agreement from the fact of parallel activity alone improperly expands the concept of concerted action beyond irrational or fair limit. I'm looking, Your Honor, at 73 New York 2d, at page 508. So the New York Court of Appeals has expressly rejected the concept offered by Ms. Barnes to

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you about parallel activity.
So, if you look, Your Honor, at what Mr. Ricker actually said, as opposed to the unfounded unsupported statements as to what people think he said, if you look at his actual words and ask yourself, so what, the answer has to be, I suggest, that his declaration does not come close to meeting the standards of either enterprise liability or concerted action, which are the only two legal justifications offered to reopen discovery.
Now, reopening discovery, you know, doesn't just go to a few depositions. Reopening discovery necessarily goes to wherever those depositions lead, and really has the potential to open the floodgates to all sorts of people to testify to this. And if your starting point is -- and since Ms. Barnes' starting point is Mr. Ricker's declaration, there is something -- there is simply nothing which he actually said to justify the extraordinary relief which is being questioned here. Thank you, Your Honor.
THE COURT: All right. Thank you. Yes?
MR. HERFORT: Your Honor, I just have a couple of things, if I may.
First of all, I would like you to look, if you would, at the transcript that I left on your desk. We can give you some additional items in there, and we'll send you a brief letter today telling you the pages we would like you to look

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at that bear a little bit on what we are talking about.
THE COURT: So this is mine to keep?
MR. HERFORT: Could I look at it one minute? I don't want to impose on you with a bunch of crazy handwriting.
Just a couple of other things.
Mr. Delfay's name came up. He was deposed in Hamilton, Your Honor. He's not a new person.
Delfay -- excuse me, Your Honor. There's been some discussion about Mr. Squire, who attended these meetings that Mr. Ricker talks about. Ricker says he attended these meetings from '92 through '97, and that's at line 17 of the 11th page of his affidavit.
Well, in fact, Ms. Barnes took Mr. Squire's deposition in January 1998, and she said prior to his Powder Horn experience, what was his prior job. And he said - this is at page 17 of the deposition - he said, yes, I was vice-president and general counsel of Colt. If you just give me the dates. That was '89 or '90 up through 1991. So I think we ought to get that fact straight.
In terms of the practicality of reopening discovery, I suppose there's another point that we can't really ignore, if we are going to start doing depositions, which I think is anything to call for, we really have a problem of reopening expert discovery and expert reports, because the expert reports are based on, to a certain extent, depositions in this

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case, and you do have a problem of unraveling the ball with the string in a way that I don't think is right for the parties and right for the court.
THE COURT: Okay. Well, I have to say I don't have an expert by expert knowledge of what they are all going to testify to about a lot of what they have to say, has very little to do with I think this particular fairly limited issue.
MR. HERFORT: Actually, I think the expert report that was put in this motion talks about joint activity, makes allegations about joint activity. So if we are going to reopen joint activity as an issue through the rather attenuated angle of one paragraph in Ricker's Declaration, I think you are going to get some reopening of the expert situation.
MR. RENZULLI: Your Honor, if I may. I was at Gregory Gundlach's deposition. Although I only had 12 minutes, I asked him if he was going to rely on this Ricker affidavit, and his answer was "yes," although his report did not show that. So I can get that testimony, if you want.
THE COURT: So you may already have the problem with respect to Professor Gundlach anyway.
MR. RENZULLI: In terms of the Ricker affidavit, and I think there are other experts that you have, funny things happen after deposition getting to trial. I don't know who is

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going to rely on what, just for your consideration.
MR. HERFORT: One thing I would like to say before I sit down, if I may, the disciplinary rule that Mr. Joseph and I talked about, you know, the first sort of rule about the lawyer possibly not being allowed to act, where it's obvious that he ought to be called as a witness on an issue on behalf of his own client, does have a very important proviso which is the form at the end. It says: As to any matter of disqualification as an advocate works a substantial hardship for the client because of the distinctive value of counsel in a particular case, you don't have disqualification.
THE COURT: Right. I think Mr. Joseph mentioned that. I believe he spent time on that issue.
MR. HERFORT: Thank you, Your Honor.
THE COURT: Ms. Barnes, is there anything else you want to say on this issue?
MS. BARNES: No, Your Honor.
MR. GROSS: David Gross, Your Honor.
Do you have the Feldman deposition? I'm not sure which one you have.
THE COURT: I don't know if I have the Feldman one.
MR. GROSS: It was referred to.
THE COURT: I may have it in boxes somewhere packed away, but I don't think I have it in hand. Mr. Feldman's deposition, somebody mentioned it. Do I have it?

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MR. HERFORT: We gave you some of it, Your Honor, in the sheaf of exhibits that we gave you. It is Exhibit H, not the whole thing.

THE COURT: okay. Is there something you want me to look at, Mr. Gross?

MR. GROSS: The reason I asked you about it, Judge, you seem to be concerned about what Ms. Barnes seemed to know or didn't know some while ago that was of interest to the court. It seems to me that Your Honor should have the opportunity to see what was covered in this rather lengthy deposition.

THE COURT: I'm happy to look at whatever I have. If there's specific information pages that you think I should have, Mr. Gross, I'm happy to take them from you.

MR. GROSS: Thank you, Judge.

THE COURT: All right.

We have the next issue.

MR. CONNELL: Yes, Your Honor. The next issue pertains to incident reports.

We received defendant's opposition papers last night. I believe the court did as well. Essentially what plaintiff's motion deals with is about 108 boxes of incident reports which are police reports and related documents recovered in various municipalities around the country, Boston, San Francisco, Los Angeles, both the city and county

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of Los Angeles, and I believe other municipalities whose incident reports may or may not have been offered by defendants.

The incident reports, as I stated, allegedly relate to all incidents in which guns were recovered by law enforcement agencies in those areas.

You know, it is plaintiff's understanding that defendants had much of these incident reports as far back as 2001. Some of them relate to thefts of guns from retail stores. Some of them relate to, you know, guns recovered in relation to a homicide. They are clearly responsive to various demands that plaintiff served, and defendants repeatedly and throughout deny any knowledge of having documents like this. So that to spring hundreds of thousands of documents on us at the eve trial is somewhat shocking and a violation of the federal rules, and under Rule 37(c) they should be excluded from use.

THE COURT: Well, let me just interrupt you for one second because I think there are several pieces to this issue.

MS. CONNELL: Sure.

THE COURT: I looked at Judge Weinstein's discussion of this issue preliminarily on January 29th, and it is not clear to me that the question of exclusion of these incident reports is properly before me. I read his discussion of this

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issue as saying at least at that point in time go forward, get the incident reports, do your own sampling, and then we'll see where we stand down the line. I don't feel at this point, having read this, that I have the authority to say the incident reports are out of the case and we are not going to move forward. So I think the issue is very -- you've gotten the documents that you are entitled to get, and if not, what can we do to expedite that process.

MS. CONNELL: Well, Your Honor, I have gotten -- we did manage to find a place and got the boxes of the Boston documents, which I think were about 28 boxes. I'm in the process of getting the other boxes from Jones Day, was quite a trial to find a place to put them and find somebody to take a look at them. I have been informed by Jones Day now they want us to pay for the copying of them, although they are going to pay for redactions, they will do, and they would like us to receive them I guess in rolling distribution, kind of deliver them in bits and pieces for some of the defendants, but something happened in the interim. My understanding of Judge Weinstein's order or his direction at the hearing was that we should go through the process.

So, two weeks after that hearing, based upon defendants' representations at the hearing, I anticipated getting the random samples that their experts were going to use. As Mr. Fennell said, this is expert disclosure we didn't

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have to give you. This is earlier. What I received on February 12th was one sample, which was just a list of the incident reports that were relied upon by Mr. Wecker -- Dr. Wecker, who is one of defendants' experts, but various other experts from at least a dozen or more from counsel saying here's a list of incident reports we may use at trial.

Now, other than certain exceptions like reports relating to the BATF data, and reports by I guess Leahey & Johnson relating to social sciences, because they received exemptions from Your Honor, all expert reports were supposed to be received by plaintiffs earlier this week. So the only other expert report that I know that will relate to these incident reports is an expert report filed by Colt's, and this report is filed by a retired San Diego police officer who reviewed the incident reports, somehow distilled the information therein, and came to the conclusion -- this former officer concludes that a substantial percentage of the incidents reviewed, the Colt's firm was not viewed in a crime or recovered in connection with the crime. I bring this up to demonstrate to you the defendants will introduce them as fact, not part of expert testimony, but somehow in the factual presentation of their case, and I would like to provide a copy of this report to you.

But in it you will see, you know, former Officer Bridgeman qualifies as not recovered in relation to a crime,

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an instance where a homicide occurred, two suspects were arrested, and 15 guns were recovered in connection with the suspects, but there's no evidence that he found in his investigation that the firearms recovered, which included a Colt, were used in the homicide.

Now, I don't know if we are going to hear lots of testimony like this at trial, which is clearly factual, and we are going to have no time or way to rebut this. And I don't think that this is the expert or the process that Judge Weinstein envisioned. And I think because this is factual information that should have been produced during discovery, you know. Surely Dr. Wecker's testimony on this would be subject to a motion to exclude before Judge Weinstein, which will be heard right before trial, but this is a different issue. And the other defendants who have designated, you know, incident reports, and I understand that in almost all of the cases it is incident reports that certain incidents that relate to their client, that particular defendant only, apparently it is not going to be used by an expert witness unless it is included in Dr. Wecker's designation, then the only apparent use is factual. And I would ask that those be excluded under Rule 37(c).

MR. RICE: Your Honor, Michael Rice for the defendants.

Rule 37(c) is a somewhat different issue. Let me

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talk about what was disclosed to the plaintiffs on February 12th, and what Mr. Fennell had informed Judge Weinstein would be disclosed.

The first disclosure was in fact the sample that Dr. Wecker and Dr. Mathiowetz are going to rely on that was as explained in the hearing, this, as you saw in the transcript the focus of the principal use of the incident records from Boston and California, and those were provided the list was provided and copies included redacted copies of California that sample was provided.

THE COURT: So every document that was looked at in taking the sample has been given to the plaintiffs and they are relying on in that particular series of expert reports.

MR. RICE: The sample was provided to the plaintiffs. They made a random sample of the entire universe, pulled the random sample, and that's what Judge Weinstein asked us to give was give a list of the sample they are going to rely on.

THE COURT: How did they go about selecting the sample?

MR. RICE: There's an electronic list of the incident numbers and they did a random sample of the number which were then pulled out of the entire universe of the documents. Let me back up.

Plaintiffs have now two days ago, I guess, picked up

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the Boston 28 boxes that have been sitting there waiting for them since January 10th, and we are now going to be forwarding, if they want, the entire California set, and we'll redact them as required to by the producing parties, and that's the only basis we are talking about going through taking out names and addresses. We have offered to let them do a sample of those documents, without having to produce the entire set. We offered them the electronic list of the incident reports, if Ms. Allen wants to use them as to generate a sample, however they want to generate the sample. We offered them to do that, pull those and redact them first so that they could get them as quickly as they want. Again, those documents have been available since January 15th, and the request to actually get those occurred February 12th.

THE COURT: When you say there's an electronic list --

MR. RICE: Sure.

THE COURT: How is this list -- I mean, is it a chronological list? Is it a list by the name of the suspect? Is it a list by the name of the gun? I mean --

MR. RICE: These are essentially law enforcement incident records. Each one has an identifying number that the underlying law enforcement agency gives it, and those are what we call the incident numbers, and that incident number, just the numbers that were produced or listed, are put on the

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electronic list. It's essentially taken off the incident report, take the incident number, put it on the list, and so there's a list of them. They did a random sample of those. That's the sample pulled and provided to the plaintiff on February 12th. We are happy to give them the entire sets, as in Boston.

With California, I simply suggested if they were going to do the sample, we can do that first and get them that portion of the entire set as quickly as possible, because they have to do the redacting process, and I wanted to move that along as quickly as possible. But as I understand it, they wanted all of it without starting there. So we'll start with box one and do that.

THE COURT: You just lost me now. I thought you had already produced the ones that constitute the sample?

MR. RICE: We have, I'm sorry, Your Honor. We had produced all of the Wecker and Mathiowetz samples that the defendants are using.

THE COURT: Okay. So what are the two categories that you just spoke of, if she wants to do her own sample?

MR. RICE: If plaintiff's expert wants to draw a sample, we'll get that sample to them first. I can't force them to do that. I was trying to facilitate a way to get the part they wanted to use as quickly as possible. If they want the entire set, less than 80 boxes, we'll do that, and do it

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on a rolling basis as quickly as we can.
THE COURT: what are the Boston documents used for?
MR. RICE: The same thing. Those we didn't have to redact. We were able to give them the entire set as they were. There wasn't this redaction issue.
THE COURT: Do the Boston documents -- was a sample taken of the Boston documents and that's also included in the Wecker report?
MR. RICE: Yes.
THE COURT: I see. Okay. And you have given her these as well?
MR. RICE: Yes.
THE COURT: And what about the expert report that Ms. Connell was just referring to, what is the police officer's report -- I've forgotten his name.
MR. RICE: Bridgeman.
THE COURT: what is the use of the reports in Mr. Bridgeman's report?
MR. RICE: Let me back up and go back to the hearing before Judge Weinstein.
I want to make it clear that at the hearing before Judge Weinstein, that Mr. Fennell took pains to come back and point out to Judge Weinstein that it wasn't just Dr. Wecker and Dr. Mathiowetz, that individual defendants may also use some of these documents, and Judge Weinstein said get it to

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them promptly. So the fact that individual defendants also gave a smaller subset was not something that was a surprise or was contemplated in front of Judge Weinstein.
Mr. Bridgeman in the transcript Mr. Fennell refers to as a definitive expert, because we see him as an expert, as someone who had particular knowledge of police reports, and what is in them, and how you interpret them, and what they mean. And so he will come in and, as his report was disclosed in a timely manner, he will testify about what those incident reports reflect vis-a-vis the tracing database house. It is characterized in the tracing database versus what is reflected in the incident reports, and other related material that is again in the report about, you know, what you can gather from reviewing the information.
I am not an expert on what Mr. Bridgeman is going to testify about. He's obviously an expert designated that will be deposed. Plaintiff will haven't an opportunity to question him about what he has done and what the basis of his report is.
THE COURT: The other defendants who have designated documents, specifically reports, and provided them to Ms. Barnes, are there experts who will be testifying about those documents?
MR. RICE: I can't speak for how the other experts or how the other defendants are all going to use that

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information. And if they want to address that, they can.
Let me back up to the premise for Ms. Connell's argument, which is that if an expert is not using it, it should be excluded under Rule 37(c), because we can dispose of that issue, and then we just get back to the same issue that Judge Weinstein has already dealt with, which is delay and so forth in the production of the documents.
37(c) presumes that these are documents that were the defendants' documents that we somehow had an obligation to produce. These were in fact documents produced by the municipalities in California and by the municipality in Boston during litigation, under protective orders quoted in my letter response to the court that precluded the use of those documents, precluded the use of those documents at any other litigation, and requires the return or destruction of those documents at the conclusion of that litigation. So these are not in any sense the defendants' corporate documents that they process.
The rule that the plaintiffs are pushing for would have practical effects that don't make any sense. It would, for instance, require that these defendants now produce the national trace database, that had been produced to us in this case, to the plaintiffs in California. Because that is "in our possession" and under their reading is now a defendants' document, that we should be producing in discovery out there.

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Obviously that's not something we can do because we have a protective order here.
THE COURT: Let me ask you a question. I understand what you are saying, but you have had these documents - I don't know that you necessarily have them, I'm using the use of "you" as general you - you had these documents for a long time. You had access to these documents in connection with the other case. I would venture to say that you were aware of the information in the case and its potential relevance to this action, determined that you were going to use these documents in this action, and waited until the eleventh hour to issue the subpoena to get them again in this action, so as to turn them over at the very last minute to plaintiff's counsel. I think that's the argument.
MR. RICE: And they can make the argument. You know, you can put me under oath. I can say that's not what happened, that we didn't wait. It wasn't a calculating strategy to wait until the last minute. We issued the subpoenas in July and August of 2002, because we realized discovery was coming to a close.
You have to remember, again, that we are looking at a case that had been rolling along on motions until Judge Weinstein suddenly converted it to a case that is going to go to trial, and going to go to trial quickly. So the fact discovery that everyone was doing everything not just related

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to these documents, but related to all fact discovery in this case, suddenly was condensed and happened quickly. This is one of the issues we put on the list in the subpoenas themselves. They claimed surprise. They suggest that in 2003, January 15, 2003 was the first time that they found out that we had these documents. The subpoenas themselves that we served on them in July and August of 2002 indicated in the subpoena that the documents we were seeking were documents that were already in our possession, and that we were subpoenaing them so that we could have access to them and use them in this litigation. We weren't trying to hide them. This was not hide the ball. This was we were subpoenaing the records. We can't use them in this case. We want to use them because as the case is developed, we think it will be relevant. Those were the issues in fact argued and briefed before Judge Weinstein, and appropriately Judge Weinstein said let's go forward. I will not saying they are admissible or ultimately let them in, but I will not shut the process off now, and that's the process we are going through.

THE COURT: What troubles me is we have had open discussion about the plaintiff's efforts to get from the ATF documents which they subpoenaed and which they were having problems getting, and on every single occasion, I believe at which we held a hearing in this court, to try to expedite that production, I invited those of you who wished to attend from

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defendants' sides, even though you yourselves had not subpoenaed the documents.

What troubles me is that even though you may have issued your subpoenas in June, we did not get these documents in response to the subpoenas until some time after the close of discovery in August, the end of August, and there's been a lot of argument made to this court that discovery after the end of the August should not be allowed for a variety of reasons, which I will not repeat here. Yet I'm troubled by the fact that during this entire period of time, from June to whenever you finally got the documents, September or October, nobody said to me, hey, Judge, you know, we subpoenaed these months ago. We are having trouble getting these documents. This is going to delay our ability to produce these documents, to the plaintiff. That's what troubles me about this whole incident.

Now, I understand Judge Weinstein hasn't made a final ruling on this, and I'm not going to make a ruling on this one way or the other. I just want you to know that I'm troubled by the actions relating to these documents.

MR. RICE: And, Your Honor, I understand that, and, you know, the court will think what it will. I will tell you the honest answer to that is unlike the ATF subpoena, these subpoenas were subpoenas issued by this court. So it wasn't an issue that we felt - and I understand Your Honor suggests

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that we just should have raised it - but we couldn't come to this court and say, Your Honor, will you force the City of Boston to go ahead and get these documents to us? Will you force the Los Angeles entities to get these documents to us?

THE COURT: No, but what I would have done, and what I could have the authority to have done, is order you to notify plaintiff's counsel every time you had a meeting with the attorneys dealing with the Boston and California documents, so that they could be involved in every step of the way, just as I allowed you to be involved in every step of the way in trying to obtain the ATF documents.

The whole point here is that we are all operating under very tight strictures, time frame wise, and my job is to try to make it fair for everybody, and I can't do that if you don't let me know what is going on. Frankly, if asked my view on this by Judge Weinstein, I will say that I don't think it was fair the way you dealt with this issue in this particular instance. But he hasn't asked me for my view, and until he does, you know, I'm not going to volunteer it. But I just want you to know that I'm troubled by that particular aspect of this dispute.

That being said, my main question to you is, we need these documents redacted and presented to plaintiff's counsel as quickly as possible. When can we get them?

MR. RICE: I mean, we'll start redacting them right

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away. I told them last week that it would take at least a week to do this many boxes and to redact them because the names are in there a lot, but we are doing it on a rolling basis so that they start getting them as quickly as we can.

MS. BARNES: When is quickly?

THE COURT: Tuesday. I want all of these documents to her by Tuesday. You have a million firms involved. I am sure you all have paralegals who can get together, have a nice weekend, free pizza on the firm, and they can do a lot of redactions. Tuesday for these documents.

MR. RENZULLI: Your Honor, I have to disagree with the tone of the court here, and you don't know the whole story once again. I had 13 defendants that were deposed in this case. A question was asked to each defendant: Mr. Defendant, if a gun is traced, does that mean the gun was involved in crime? Answer: No.

What is your basis for that, sir? I have been sued in the California municipal case and in the Boston cases. As part of discovery in those cases, I received the police reports which clearly stated that my gun was not involved a crime. On the record, under oath, at a deposition. Okay. And as you remember, Judge, all of these depositions were occurring this summer, one after another, because you ordered them to be that way, and we complied. I don't have 500 lawyers. The bottom line is that this was divulged to the

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plaintiff. The mechanisms were put in place to dealing with plaintiff's lawyers, who are suing us in other cases in order to get their sensitive documents. That's what we did.

Ms. Barnes asked questions of my defendants. Well, what are you talking about? What kind of police reports did you get? And they told her what police reports they had reviewed. I could not take those police reports and hand them to the plaintiff. I was precluded in doing so because there were protective orders in place in these other cases, one of which is still being litigated. Why is there a sneak attack? Every defendant that was deposed in this case that I represent was asked that question and gave that response, if they were in the Boston or California litigation. And I don't represent to the court that they were all in that litigation, but many of them were.

So, the limited purposes for which the individual defendants are using these incident reports, that is, when they are cross-examined at the time of trial, a traced gun is a crime gun. I beg to differ. What is your basis? Police reports. There's no sneak attack here, Judge. We are working as fast as we can do get everything done.

THE COURT: Now, Ms. Barnes, we know how they are going to use the trace reports without the expert. That's been very helpful. Thank you, Mr. Renzulli.

MR. RENZULLI: That's all I'm using it for. I'm not

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here to do statistical models. Dr. Wecker is a statistician. I don't understand half of what he does. As an advocate for my clients, I'm using these particular incident reports for a limited purpose for which I divulged to counsel on the record.

THE COURT: I mean, to the extent that your clients answered the questions, I understand what you are saying. I guess --

MR. RENZULLI: I don't like to be painted in a light of, you know, we represent nefarious clients.

THE COURT: Mr. Renzulli, I never paint you in any nefarious light.

MR. RENZULLI: The whole thing is, what burns me up is I wanted to take a deposition of a company, okay, that did a survey about retailers in the industry. Your Honor ruled, and I didn't agree with it, and you know I didn't, that we should wait for Ms. Allen's deposition. Critical information that was asked of questions of retailers in this industry, and I have to wait for Ms. Allen. Okay. So I went home. I kicked the dog, I punched the wall. I said, this is justice? Now I have, and this is not a laughing matter, I --

THE COURT: I hope you didn't kick the dog.

MR. RENZULLI: I don't have a dog. I have a problem with being painted about, you know, you got paralegals. You can take a weekend and get pizza. Listen, I don't think we belong here, but the Judge disagrees, okay, so we are here,

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and I'm trying to be here under controlled conditions. But I don't -- these things -- they get up and they say these things like this is what these guys are doing. It's not true. I will send you, and your law clerk will kill me, I will send you the question and answer from every deposition of every client that I represent that was asked that in their answers. I want you to have that, and I don't want to be painted in a negative light. I am offended by that. I'm offended by that.

MS. BARNES: Will you also send, Mr. Renzulli, my letter to your clients asking for those documents?

MR. RENZULLI: Who got you the 28 boxes of Boston documents no charge, Ms. Barnes?

MS. BARNES: Will you also send the letters in?

MR. RENZULLI: I specifically asked for those documents immediately after Mr. Jennuzzo's deposition, Your Honor.

THE COURT: Tuesday.

MS. CONNELL: One more issue.

THE COURT: Yes.

MS. CONNELL: Your Honor, the fact that this is maintained electronically is somewhat new. I asked Mr. Fennell on the 12th or 13th, and if the incident reports were kept in the electronic format, I ask that be produced.

MR. RICE: I offered them in a letter to be given them an electronic list, not the records themselves. The records

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themselves are not, but the electronic listing I'm more than happy.

THE COURT: That you used to prepare the sample?

MR. RICE: Yes.

THE COURT: Can you get that to them sooner than later?

MR. RICE: Yes, I can do that today. That's no problem.

MS. CONNELL: Thank you, Your Honor.

THE COURT: There were issues raised by some defendants. Maybe I'm wrong. Maybe we are done.

MS. CONNELL: We had one motion by Mr. Renzulli, Your Honor, on his application for another deposition of witness Collins. Plaintiffs were supposed to put in papers today, but Mr. Renzulli wanted to argue it. We would ask that we be allowed today to put in papers, if the court feels it's necessary.

THE COURT: That's fine. Since you are here, let me hear from Mr. Renzulli, unless you have an objection to that.

MR. RENZULLI: Your Honor, I have been out of pocket a little bit here, but I thought we filed a motion and earmarked for the court exactly --

THE COURT: You did. Do you have anything to add?

MR. RENZULLI: No, nothing to add.

THE COURT: Okay. Then I don't need to hear from

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you.
MR. RENZULLI: I have nothing to add. If there's papers going to be presented, then obviously I would like -- give me 24 hours to send something to you by fax.
THE COURT: You will send it to me today?
MS. CONNELL: We'll endeavor to have it over to you tonight, your Honor. I apologize, the motion schedule has been somewhat hectic, but, yes.
THE COURT: There was one particular issue in there that relate to do a privileged question and I am assuming that would definite willing be raised; am I right?
MR. RENZULLI: Yes, because we are moving, and I must confess I haven't studied the papers. If an expert is relying on documents that he says are privileged and confidential, and yet reaches a conclusion that based thereon, but will not present them to the defense, it is impossible for us to defend ourselves, and under those conditions we would move to strike not only his testimony, which is the predicate or foundation for that testimony, unless we are going to get the documents.
THE COURT: Right. I understand. I have to see what they will say. That was the issue raised at the deposition, and at that point there was a need to confer with counsel in the other cases, if that's where this information came from. That's what I'm waiting to hear from Ms. Barnes on.
MS. BARNES: Thank you.

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MR. RENZULLI: I think I asked for identification of the documents so that we can lay out a motion. I didn't get that, but maybe we will get that.
THE COURT: Let's see what we get, Mr. Renzulli. You can respond. If we get them today, could I get your response Monday?
MR. RENZULLI: Yes, by the end of business Monday.
THE COURT: I want to make sure we have enough time.
MS. BARNES: Thank you, Your Honor.
MR. RENZULLI: Thank you, your Honor.
(The proceedings are concluded.)